

**United States Department of Commerce
National Oceanic and Atmospheric Administration**

**In The Federal Consistency Appeal Of Millennium Pipeline Company, L.P.
From an Objection by the New York State Department of State
Pursuant To The Coastal Zone Management Act**

**Amicus Brief of the Village of Croton-on-Hudson, New York
And
Public Comments of the Village of Briarcliff Manor, New York**

Pursuant to 15 C.F.R. § 930.128(a) (2002), and in accordance with the U.S. Department of Commerce's grant of *amicus* status,¹ the Village of Croton-on-Hudson, New York ("the Village") respectfully submits to the Secretary of Commerce ("Secretary") the following *amicus* brief. The Village supports the New York State Department of State's ("NYSDOS") finding that the Millennium Pipeline Company, L.P.'s ("Millennium") proposed pipeline is inconsistent with the Coastal Zone Management Act ("CZMA"),² and it requests that the Secretary deny Millennium's appeal of that finding. This Brief shall also constitute the initial public comments of the Village of Briarcliff Manor, New York, in this proceeding.

I. Opening Statement

Millennium characterizes its appeal as "unique" because the pipeline and its environmental impacts, "including its effects on the coastal zone," have already been reviewed and approved by the Federal Energy Regulatory Commission ("FERC").³ But, for purposes of

Letter from James R. Walpole, National Oceanic and Atmospheric Administration ("NOAA"), to Neil L. Levy, Kirkland & Ellis (representing the Village of Croton-on-Hudson, New York) (July 17, 2002).

² Letter from George R. Stafford, NYSDOS, to Thomas S. West, LeBoeuf, Lamb, *et al.* (May 9, 2002) ("NYSDOS Objection").

³ Initial Brief of Millennium Pipeline Company, L.P. at 1-2 (Aug. 12, 2002) ("Millennium Initial Brief").

Millennium's appeal of the NYSDOS Objection, that is not relevant: FERC does not have exclusive authority over coastal resource matters, and "the concept of deference is inappropriate in the appeals process."⁴ More fundamentally, this statement reflects Millennium's deep-rooted disregard for the entire CZMA review process and its substantive requirements. It is perhaps this attitude, more than anything else, that has led to this appeal.

Indeed, the unique aspect of this proceeding is Millennium's failure to recognize the significance of the coastal problems created by its proposed pipeline route, and its refusal to accommodate the recommendations of several federal and state natural resource agencies that the pipeline be re-routed to avoid protected segments of the Hudson River. In addition to NYSDOS, the U.S. Army Corps of Engineers ("ACOE")⁵ stated recently that it has "substantial concerns about the environmental impacts of the proposed Hudson River crossing, similar in nature to those expressed by DOS," and that "[i]mplementation of any of these alternatives would largely address [ACOE's] concerns."⁶ Similarly, the U.S. Fish and Wildlife Service ("FWS") stated that "the project would result in substantial and unacceptable affects to aquatic resources of National importance," and that "[t]he Service believes that the proposed crossing of Haverstraw Bay should be avoided and an alternative with fewer impacts selected."⁷ Even agencies in the U.S.

⁴ In prior CZMA appeals, the Secretary has consistently held that it "must consider *de novo* . . . whether the proposed activity is consistent with the objectives and purposes of the CZMA or otherwise necessary in the interest of national security," and that, as such, "[t]he concept of deference is inappropriate in the appeals process." *Amoco Prod. Co.*, 1990 NOAA LEXIS 49 at *33 (July 20, 1990) (rejecting Amoco's argument that the Secretary of Commerce must defer to the prior decision of the Department of Interior regarding the proposed activity).

⁵ The ACOE must approve the project under Section 404 of the Clean Water Act. It has yet to do so.

⁶ Letter from John B. O'Dowd, ACOE, to Richard E. Hall, Millennium, at 2 (Aug. 13, 2002).

Letter from David A. Stilwell, FWS, to Col. John B. O'Dowd, ACOE, at 1, 3 (Mar. 5, 2002). In its Initial Brief, Millennium attempts to discredit the FWS statement on the basis that it was issued before Millennium generated its long-delayed blasting plan and impact analysis. *See* Millennium Initial Brief at 62-63. This is irrelevant; (Continued...)

Department of Commerce noted during the FERC proceedings that “the ecological sensitivity of Haverstraw Bay remains the basis of our opposition to the proposed Millennium Pipeline Company alignment,” and that “an out-of-Bay, less damaging alignment should be pursued if a crossing of the Hudson River is necessary or appropriate.”⁸

Despite these concerns, Millennium pressed forward with its pipeline as proposed. Millennium chose the route because it appeared to be the most profitable and simplest route to construct. But Millennium’s initial reviews overlooked the fact that this route placed the pipeline directly within an area recognized by the U.S. Department of Commerce as “irreplaceable” habitat warranting special protection under the CZMA as a Significant Coastal Fish and Wildlife Habitat.⁹

Nevertheless, even after the CZMA implications of this route were brought to Millennium’s attention, Millennium chose to “dig in its heels” and reject calls to re-route the pipeline. And now, Millennium attempts to rationalize its proposed route by claiming that the pipeline will actually “*protect and enhance* coastal zone resources.”¹⁰ Common sense alone dictates that dredging and detonating explosives within an untouched, protected aquatic habitat

FWS’s objection was based, not solely on the effects of blasting, but on the overall destructive impacts of the proposed crossing on the protected habitat and aquatic resources of Haverstraw Bay.

⁸ Letter from Stanley W. Gorski, National Marine Fisheries Service (“NMFS”), U.S. Department of Commerce, to Kevin P. Madden, FERC, at 1-2 (Mar. 10, 2000) (response to FERC environmental information request regarding potential construction windows in Haverstraw Bay). Although NMFS ultimately issued an incidental take statement on the narrower issue of endangered species impacts, the underlying basis for its objection to the proposed crossing location -- the pipeline’s impacts on habitat and fisheries in general -- remain unchanged.

⁹ *Id.* at 2 (“We have and continue to concur with the NYCMP analysis and findings,” including “the NYCMP’s conclusion that this habitat is irreplaceable.”).

¹⁰ Millennium Initial Brief at 32 (emphasis added).

zone is a fundamentally destructive operation that will have significant adverse environmental impacts.

Similarly, Millennium has attempted to skirt its CZMA obligations to the Village's Wellfield and the Jane E. Lytle Memorial Arboretum ("Arboretum"). The Wellfield and Arboretum are protected coastal resources located in a U.S. Department of Commerce-approved coastal zone and designated for special protection under the enforceable policies of the Village's Local Waterfront Revitalization Program ("LWRP").¹¹ Even though the pipeline would traverse these areas, Millennium initially refused to provide NYSDOS a consistency evaluation of the pipeline's impact on these areas, arguing that there was "no reason why those aspects of the project should be of any legitimate concern to the Department of State."¹² In its Initial Brief, Millennium still persists in arguing that "these small areas are of no coastal significance,"¹³ and, as such, the pipeline "cannot possibly have significant adverse ecological or visual impact on coastal resources."¹⁴ The NYSDOS Objection -- which is presumed valid for the purposes of this appeal¹⁵ -- correctly rejected Millennium's arguments and determined that these areas are protected coastal resources, that the pipeline would have significant adverse impacts on these

¹¹ The Village's LWRP is attached hereto as Exhibit 3 at tab 8. The LWRP, which sets forth the CZMA "enforceable policies" applicable to proposed activities that may affect that portion of the coastal zone within the Village, was adopted by the Village on March 16, 1992, and was subsequently approved by NYSDOS as part of the State Coastal Management Program on June 15, 1992. *See* Letter from Gail S. Shaffer, NYSDOS, to Robert W. Elliot, Mayor, Village of Croton-on-Hudson, New York (June 15, 1992).

¹² Letter from Thomas S. West, LeBoeuf, Lamb, *et al.* (representing Millennium), to William F. Barton, NYSDOS, at 4 (July 26, 2001).

¹³ Millennium Initial Brief at 14, n.9.

¹⁴ Millennium Initial Brief at 65.

¹⁵ *See, e.g., Southern Pac. Transp. Co.*, 1985 NOAA LEXIS 73 at *13 (Sept. 24, 1985).

areas, and that the proposed route is inconsistent with the State's Coastal Management Program ("CMP") and the Village's LWRP.¹⁶

The Village would note that it has never espoused the position that this pipeline should be prohibited in its entirety. Rather, the Village's view was -- and is -- that the pipeline would be acceptable as long as it was sited along a route that avoided unnecessary impacts on the environment and on local communities. It was in this spirit that the Village reviewed the ever-changing route options and even voiced initial support for further evaluation of certain upland realignments in Westchester County.¹⁷

But the Village has always had fundamental concerns about routing the pipeline across Haverstraw Bay, and its determination to protect the Village's Wellfield and Arboretum has never waived. Any preliminary support there may have been quickly eroded as the true impacts of the so-called "ConEd Offset/Taconic Alternative" route came to light -- for the first time -- when FERC finally published its Final Environmental Impact Statement ("FEIS") in October 2001, and as it became clear that Millennium had no intention of realigning the pipeline around the Wellfield or the Arboretum.

Moreover, Millennium's belated disclosure -- *after* the FEIS was issued -- of its plans to detonate explosives in Haverstraw Bay provided the final "nail in the coffin" in terms of Millennium's credibility on environmental matters. It appeared that no matter what activity was proposed or what resource would be affected, Millennium simply repeated its mantra that the impacts would be "insignificant" and that additional regulatory review was "unwarranted." It

¹⁶ NYSDOS Objection at 4, 14.

¹⁷ Letter from Keith Austin, on behalf of Village of Briarcliff Manor, Town and Village of Ossining, and Village of Croton-on-Hudson, to David P. Boergers, FERC (Mar. 28, 2001).

left the Village and other affected communities seriously doubting Millennium's "no impact" assertions and wondering, "what else is there about this pipeline that we don't know about yet?"

In this Brief, the Village writes in support of the NYSDOS and argues that the Secretary should uphold the NYSDOS Objection because:

- the objection was timely and proper in all respects;
- the proposed pipeline is not "consistent with objectives or purposes of the [CZMA]" ("Ground I");¹⁸ and
- the pipeline is not "necessary in the interest of national security" ("Ground II").¹⁹

In particular, the Village emphasizes, and provides supporting evidence in the exhibits to this Brief, that Millennium has several other reasonable and viable options, some of which would actually be shorter in length and cost *less* than the current proposed route.²⁰ All of these alternatives would serve the project's purposes without having to blast and dredge across one of the most important aquatic habitats in the entire Hudson River estuary. As such, upholding the NYSDOS Objection will effect the proper balancing of competing national interests mandated under the CZMA.

II. The NYSDOS Objection Was Timely Because (1) Millennium Agreed To Extend the Review Period And (2) Any Delays Were The Result Of Millennium's Own Actions.

The CZMA regulations allow the Secretary to issue a "procedural override" of a state's consistency objection if the objection was the product of procedural error or otherwise not made

¹⁸ 15 C.F.R. § 930.121 (2002).

¹⁹ 15 C.F.R. § 930.122 (2002).

²⁰ Maps of the Village's proposed alternative routes are appended hereto as Exhibit 1. In addition, a Feasibility Evaluation of Alternatives Routes for the Millennium Pipeline Project, dated October 2002, prepared by O'Brien & Gere Engineers, Inc. ("OBG Alternatives Report") is appended at Exhibit 2.